

DATA PROTECTION ACT 1998

SUPERVISORY POWERS OF THE INFORMATION COMMISSIONER

MONETARY PENALTY NOTICE

To: H&L Business Consulting Limited

Of: White House, Keld, Penrith CA10 3QF

1. The Information Commissioner ("the Commissioner") has decided to issue H&L Business Consulting Limited ("H&L") with a monetary penalty under section 55A of the Data Protection Act 1998 ("DPA"). The penalty is in relation to a serious contravention of Regulations 22 and 23 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR").
2. This notice explains the Commissioner's decision.

Legal framework

3. H&L, whose registered office address is given above (Companies House Registration Number: 12061236) is the organisation stated in this notice to have transmitted unsolicited communications by means of electronic mail to individual subscribers for the purposes of direct marketing contrary to regulation 22 of PECR.
4. Regulation 22 of PECR states:

- "(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers.*
- (2) Except in the circumstances referred to in paragraph (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.*
- (3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—*
- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;*
- (b) the direct marketing is in respect of that person's similar products and services only; and*
- (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal) the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.*
- (4) A subscriber shall not permit his line to be used in contravention of paragraph (2)."*

5. Regulation 23 of PECR states:

"A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail –

(a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed;

(b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided

(c) where that electronic mail would contravene regulation 7 of the Electronic Commerce (EC Directive) Regulations 2002; or

(d) where that electronic mail encourages recipients to visit websites which contravene that regulation."

6. Section 122(5) of the Data Protection Act 2018 "DPA18" defines direct marketing as "the communication (by whatever means) of any advertising material which is directed to particular individuals". This definition also applies for the purposes of PECR (see regulation 2(2) PECR and paragraphs 430 & 432(6) to Schedule 19 of the DPA18).
7. Consent in PECR is now defined, from 29 March 2019, by reference to the concept of consent in Regulation 2016/679 ("the GDPR"): regulation 8(2) of the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019. Article 4(11) of the GDPR sets out the following definition:
"consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes

by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

8. Recital 32 of the GDPR materially states that "When the processing has multiple purposes, consent should be given for all of them". Recital 42 materially provides that "For consent to be informed, the data subject should be aware at least of the identity of the controller". Recital 43 materially states that "Consent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case".
9. "Individual" is defined in regulation 2(1) of PECR as "a living individual and includes an unincorporated body of such individuals".
10. A "subscriber" is defined in regulation 2(1) of PECR as "a person who is a party to a contract with a provider of public electronic communications services for the supply of such services".
11. "Electronic mail" is defined in regulation 2(1) of PECR as "any text, voice, sound or image message sent over a public electronic communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient and includes messages sent using a short message service".
12. Section 55A of the DPA (as applied to PECR cases by Schedule 1 to PECR, as variously amended) states:

"(1) The Commissioner may serve a person with a monetary penalty if the Commissioner is satisfied that –

(a) there has been a serious contravention of the requirements of the Privacy and Electronic Communications (EC Directive) Regulations 2003 by the person,

(b) subsection (2) or (3) applies.

(2) This subsection applies if the contravention was deliberate.

(3) This subsection applies if the person –

(a) knew or ought to have known that there was a risk that the contravention would occur, but

(b) failed to take reasonable steps to prevent the contravention.”

13. The Commissioner has issued statutory guidance under section 55C (1) of the DPA about the issuing of monetary penalties that has been published on the Information Commissioner’s Office (“ICO”) website. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribe that the amount of any penalty determined by the Commissioner must not exceed £500,000.
14. PECR were enacted to protect the individual’s fundamental right to privacy in the electronic communications sector. PECR were subsequently amended and strengthened. The Commissioner will interpret PECR in a way which is consistent with the Regulations’ overall aim of ensuring high levels of protection for individuals’ privacy rights.
15. The provisions of the DPA remain in force for the purposes of PECR notwithstanding the introduction of the DPA18: see paragraph 58(1) of Schedule 20 to the DPA18.

Background to the case

16. Mr Julius Gray ("Mr Gray") has been a company director since 2005. His previous directorships include Lime Loans Limited, Help Marketing Limited, J.E.R. Marketing Limited, J.E.R. Finance Limited, The Help Group Limited, Peracto Marketing Limited, Connecttxt.com Limited, The Mint Condition Media Limited and The Gray Label Inc Limited. The first four of those companies were dissolved via voluntary strike-off in 2010 and 2011. The remaining five companies were dissolved via compulsory strike-off in 2010 and 2017.
17. Between 7 June 2017 and 6 June 2019, Mr Gray was listed on the ICO's data protection register as a sole trader.
18. In June 2019, Mr Gray came to the attention of the ICO during an investigation into SMS messages promoting the website www.outofdebts.co.uk. In response to a third party information notice, the telecommunications service provider [REDACTED] identified [REDACTED] as the customer to whom the mobile telephone numbers generating the messages were allocated. [REDACTED] then identified [REDACTED] as the subscriber, and [REDACTED] informed the ICO that the SMS messages had been ordered by, and the data had been provided by, their client, Mr Gray of JG Consulting.
19. The ICO's attempts to contact Mr Gray in 2019 in connection with its investigation into the website www.outofdebts.co.uk came to a dead end, because, with the exception of three short holding emails in July and August 2019, Mr Gray failed to respond to the ICO. Attempts to contact him by post were unsuccessful. The ICO

therefore closed its investigation into JG Consulting on 26 March 2020.

20. H&L was incorporated on 20 June 2019 and is registered with Companies House under company number 12061236. It is owned and controlled by Mr Gray, who is the sole director and company secretary, and the nature of its business is listed as "information technology consultancy activities". H&L has been registered with the ICO since 28 May 2020, where the nature of its work is listed as "marketing agency" and the contact is Mr Gray. H&L does not appear to have a website.
21. H&L came to the attention of the ICO during an investigation into scams and exploitative marketing surrounding the COVID-19 crisis.
22. Mobile phone users can report the receipt of unsolicited marketing text messages to Mobile UK's Spam Reporting Service by forwarding the message to 7726 (spelling out "SPAM"). Mobile UK is an organisation that represents the interests of mobile operators in the UK.
23. On 12 May 2020, the ICO's keyword search for the word "lockdown" revealed several complaints to the 7726 spam reporting service, concerning unsolicited SMS promoting the websites "outofdebtuk.co.uk" and "out-of-debts.co.uk". The content of the SMS messages was:
 - Get Debt FREE during the Lockdown! Write off 95% of ALL DEBTS with ALL charges and fees FROZEN. Government backed. Click <http://outofdebtuk.co.uk>. Stop 2optout

- Get Debt FREE during the Lockdown! Write off 95% of ALL DEBTS with ALL charges and fees FROZEN. Government backed. Click <http://out-of-debts.co.uk>. Stop 2optout
24. The ICO searched the 7726 database and identified a total of 159 complaints about unsolicited SMS messages promoting the websites outofdebtuk.co.uk and out-of-debts.co.uk between 13 January and 23 May 2020. The ICO also searched the complaints submitted via the ICO's own Online Reporting Tool and identified three further complaints from individual subscribers in the period 13-20 May 2020: two out of the three complainants said the messages had made them feel annoyed and/or anxious; one said it was a disruption; one said, "My phone is not their advertising platform."
25. The websites stated that outofdebtuk.co.uk and out-of-debts.co.uk were trading names of [REDACTED], whose registered office was at Kemp House in London. The websites and privacy policies also contained several references to "outofdebts.co.uk", which was the same website which had been investigated by the ICO in 2019 referred to above.
26. The privacy policies on outofdebtuk.co.uk and out-of-debts.co.uk both stated:
- "By accepting our privacy policy and opt-ing IN, the data we collect from you may be sold (or otherwise passed on) to our clients and carefully selected third parties. The information passed on may include personal details such as name, postal address, telephone number and date of birth."
27. The privacy policies went on to list the following 42 sectors about which website users could expect to receive third party marketing:

Automotive, Automotive, Broadband, Call Centre, Charity, Competition Sites, Debt, Education, Entertainment\Gaming\Leisure, Fashion, Finance, FMCG, Freebie Sites, Gambling, Gardening, Government, Health & Beauty, Home & Lifestyle, Mobility, Home Improvement, Household, IT/Technical, Insurance (Life, Home, Automotive, General, Private Medical, Travel), Legal Services, Lottery, Mail Order, Market Research, Music, Pension, Pharmaceutical, Claims for mis-sold PPI, Claims for Flight Delay, Claims for Road Traffic accidents, General Claims, Premium Rate, Publishing/Media, Retail, Sport, Telecoms, Toiletries/Cosmetics, Travel, Utilities, Claims for Packaged Bank Account Fees.

28. In addition, the privacy policy on the website outofdebtuk.co.uk listed the following named third parties as companies from which users could expect to received marketing: "████████"; "████████████████"; "████████████████"; "████████████████"; "████████████████"; "████████████████".
29. The privacy policy on www.outofdebtuk.co.uk appeared to have been copied from a company called ██████████ as it included a several references to that company.
30. On 26 May 2020, the ICO sent an initial investigation letter to ██████████ informing it of the complaints received by the ICO and the mobile telephone networks. The letter outlined the requirements of PECR and the enforcement powers available to the ICO and requested ██████████ to answer a number of questions by 16 June 2020. On 4 June 2020, ██████████ contacted the ICO to say that it had not sent any marketing text messages, but that it had a client who used to take leads who had put the company's

details on its website. [REDACTED] subsequently confirmed that out-of-debts.co.uk "was a page we used to use with social marketing" and "the page is not owned by me but was by a company I was working with back of 2019, looks like they have kept details on and started other forms of marketing". [REDACTED] gave the ICO contact details for the company as "HandLItd; [REDACTED]

31. The ICO searched the data protection register, which revealed that the telephone number provided by [REDACTED] for ' [REDACTED]' was listed as the contact telephone number on the expired data protection register entry for Mr Gray.
32. On 9 June 2020, the ICO emailed [REDACTED] asking it to provide a copy of its contact with HandLItd; the name and postal address of the person with whom they dealt; the name and contact details of the client who purchased the leads generated by HandLItd; and copies of any correspondence it had had with these companies regarding the use of his company's details on the website out-of-debts.co.uk.
33. Within an hour, Mr Gray emailed the ICO from to say:

I've been made aware that you have requested some information from a previous client of mine (... [REDACTED]) regarding outofdebts.co.uk and leads generated via this site. This was a project I was involved in at the time. Could you kindly let me know what information is required from me and I will happily come back to you.

34. On 10 June 2020, the ICO sent a letter by email to Mr Gray outlining the requirements of PECR and the enforcement powers

available to the ICO and asked him to provide answers to various questions by 1 July 2020. The accompanying spreadsheet listed 548 complaints which had been received by the ICO and the mobile telephone networks between 21 February 2018 and 7 June 2020 about unsolicited SMS messages promoting the websites www.outofdebts.co.uk, www.out-of-debts.co.uk and www.outofdebtuk.co.uk.

35. Mr Gray did not respond to the ICO substantively by the deadline of 1 July 2020, so the ICO reminded him by email on 3 July 2020 and gave him an extended deadline of a further seven days. The email pointed out that, as a final resort, the Commissioner could decide to issue an information notice compelling him to provide the information he sought.
36. On 3 July 2020, Mr Gray replied, claimed to be "working on this still and awaiting news from various suppliers etc", and requested a two-week extension "in order to gather everything together". The extension was approved by the ICO and confirmed to Mr Gray the same day.
37. Mr Gray did not respond by the new deadline of 17 July 2020, therefore on 21 July 2020, the ICO reminded him by email again, acknowledging that he was waiting for information from his suppliers but asking him to provide the rest of the information, and to send the missing information as soon as he received it. The email ended with a warning that if a substantive response was not received by 24 July 2020, then the ICO would consider issuing an information notice formally compelling him to provide the information.

38. On 27 July 2020, Mr Gray sent a short holding email, apologising for his failure to reply the previous week. He explained that he had been away with his new job on a training course. He undertook to "dedicate all my time to this today and tomorrow and get all the information I can to you by end of play on Tuesday 28th". Again, Mr Gray did not respond by the deadline.
39. On 1 September 2020, the ICO issued a third party notice to the telecommunications service provider, [REDACTED], requesting subscriber details for three mobile telephone numbers which appeared to have been used to send the SMS messages which had generated the subject of complaints by subscribers in the period 16 January 2020 – 27 August 2020.
40. On 24 September 2020, the ICO sent an information notice by post to Mr Gray requiring JG Consulting to provide the information within 35 days, and stating that failure to respond was a criminal offence.
41. On 7 October 2020, Mr Gray replied by email and stated that JG Consulting was no longer trading. He stated:

"I am attempting to provide you with the answers to Annex 1 within the required time frame but I am facing a number of issues. Primarily, JG Consulting is no longer trading. I am now in full time employment and no longer self employed and also, I no longer own the laptop which I ran the business from. I can from memory provide some answers, but want to check with you what the implications are for NOT providing certaining (sic) information (for the above mentioned reasons)?"
42. On 8 October 2020, the ICO emailed Mr Gray asking him to confirm when he ceased trading as JG Consulting and when his new

company, H&L, started trading. The email confirmed that the information notice required him to provide information held by him in his capacity as a sole trader. His comments about the laptop were noted by the ICO, but it was also noted that sole traders are legally required to keep records for at least five years for tax purposes and that he should still have access to emails held in his GoogleMail account. The email reiterated that failure to comply with an information notice was a criminal offence.

43. On 8 October 2020, Companies House published a document showing that on 7 October 2020, H&L changed its registered office address from Newbeggin, Penrith to White House, Keld, Penrith.
44. Mr Gray emailed the ICO on 13 October 2020 requesting a 28-day extension of time to comply with the information notice. The ICO acknowledged it on the same day and reminded Mr Gray that he had already had over four months to gather the information. The ICO asked him to provide as much information as possible by the new deadline of 31 October 2020 and to let the ICO know when he would be in a position to provide the remaining information.
45. On 13 October 2020, the ICO received a response from [REDACTED], which confirmed that the mobile telephone numbers about which the ICO had sought information were allocated to [REDACTED]. The [REDACTED] website describes it as an SMS platform provider offering bulk SMS marketing solutions to organisations.
46. On 14 October 2020, the ICO opened an investigation into [REDACTED] [REDACTED] to establish whether it had been sending unsolicited SMS messages on behalf of third parties in breach of regulations 22 and 23 of PECR. On 26 October 2020, the ICO sent [REDACTED] an initial investigation letter, informed it of the complaints received, outlined

the requirements of PECR and the ICO's enforcement powers, and invited it to answer certain questions. On 2 November 2020, [REDACTED]

[REDACTED] replied and explained that it is a communications service provider and that its users access their service via a self-service web portal or application programming interface. All users agree to be bound by [REDACTED] terms of service, which state that users must comply with the laws surrounding consent. The relevant sections say:

"You shall only send solicited content and promotional messages when using [REDACTED].

You shall only send messages to recipients who have opted in to receive messages. If You breach the obligations herein provided, [REDACTED] reserves the right to suspend the Services provided to You accordingly, without refund.

You undertake that you will not knowingly use the Services for any illegal, immoral, or improper purposes or in any other manner which contravenes any third-party rights, any laws or requirements of a Regulator in the appropriate jurisdiction, or in any way which is indecent or offensive or in any way that could be considered as spamming and undertake not to allow any third-party to do so.

You are fully responsible for the content submitted through [REDACTED] systems, its nature, timing and other specifics nature. You warrant that all content You submit through [REDACTED] systems (including but not limited to SMS sent via [REDACTED] bulk SMS solution): (i) is sent only to recipients who have provided consent to receive the content in line with the Data Protection Legislation, where such

consent is required; and (ii) contains a link or similar to enable the recipient to unsubscribe from further communications from You, as required by the Data Protection Legislation, and You warrant that You will comply with any unsubscribe request received.”

47. [REDACTED] informed the ICO that the messages concerning outofdebtsuk.co.uk and out-of-debts.co.uk had been sent by a subscriber named Julius Grey (sic) of JG Consulting, Penrith, and H&L Business Consulting Ltd, Covent Garden. [REDACTED] confirmed that Julius Grey had sent a total of 584,632 SMS messages between 1 September 2019 and 23 October 2020, of which 497,474 messages were delivered. [REDACTED] provided copies of two invoices issued to JG Consulting on 10 December 2019 and 27 January 2020, covering a total of 60,083 SMS credits at the cost of £721 and 47 invoices issued to H&L between 20 January 2020 and 22 September 2020, covering 460,123 SMS credits at the cost of £5,521.50.
48. The ICO issued a third party information notice to [REDACTED] on 18 November 2020, requesting further information about JG Consulting and H&L, including the full list of telephone numbers allocated, the connection dates and usage periods, payment details and copies of message logs.
49. [REDACTED] responded on 10 December 2020 confirming that Julius Grey (sic) had two virtual mobile telephone numbers allocated to him. [REDACTED] had been allocated to him on 3 August 2019 and had last been used on 27 July 2020. [REDACTED] had been allocated to him on 26 November 2019 and had last been used on 22 July 2020. Payments had originally been received from “Gray JH”, however, since 27 January 2020, payments had been from H&L. [REDACTED]

Media also provided message logs listing 140,580 SMS messages sent by H&L between 18 May 2020 and 27 July 2020.

50. The ICO analysed the message logs and observed that whereas the earlier messages asked recipients to visit the website outofdebtuk.co.uk or out-of-debts.co.uk, the messages sent between 22 July and 27 July 2020 did not contain a website address but instead asked recipients to reply with the keyword "INFO" or "DEBT 2". The message logs also included 4,016 messages sent on 2 June 2020 containing the website address
[REDACTED]
51. Having considered the information provided by [REDACTED], the ICO decided to refocus its investigation on to H&L, send an information notice to H&L, and give H&L time to respond. The ICO conducted further searches of the 7726 complaints database, which identified a total of 314 complaints about SMS messages promoting the websites outofdebtuk.co.uk, out-of-debts.co.uk or [REDACTED], or which were sent from the virtual mobile telephone numbers [REDACTED] or [REDACTED], which [REDACTED] had allocated to Mr Julius Grey, between 20 January 2020 and 21 November 2020. The ICO also searched its online reporting tool and identified a further eight complaints between 20 January 2020 and 23 July 2020.
52. On 19 January 2021, the ICO sent an information notice by post to H&L's registered office address at the White House, Keld, Penrith, requiring the company to provide specified information by 23 February 2021, and reiterating that failure to respond to an information notice was a criminal offence.
53. On 22 January 2021, the ICO sent a copy of the information notice to Mr Gray by email, along with an electronic copy of the complaints

spreadsheet and a request to contact the investigating officer for the password. The ICO received an automated read receipt less than two hours later confirming that the message had been read on Friday 22 January 2021 at 5.30 pm.

54. On 8 March 2021, Mr Gray emailed the ICO to say, "Apologies as I am now employed I do not check this email very often. Please could you send me the password and I will have all the information sent over to you by Friday 12th March." On the same day, the ICO sent him the password for the complaints spreadsheet and pointed out that the investigating officer had received a read receipt showing that Mr Gray had read the email on 22 January. Mr Gray thanked the ICO officer for the password and asked her to leave it with him. In explanation for the read receipt, he said, "I'f (sic) I mark all emails on my phone as 'read' I can do this without reading each one individually (sic)".
55. Mr Gray did not reply by the deadline of 12 March 2021, therefore the ICO sent an email reminder on 15 March 2021. On the same day, Mr Gray responded and promised to provide the information by 17 March 2021. He stated, "I have taken Wednesday off work to ensure I can finish a response for you. I worked on it on Friday but certain things I struggled with. Will be over and with you on Wednesday."
56. On 18 March 2021, Mr Gray sent a holding email, promising a response on 19 March 2021. He stated, "I'm nearly there with this request. I am off again on Friday and will ensure it's over to you then. It's taking longer than anticipated to complete!"
57. The ICO received no response. On 11 May 2021, the ICO sent Mr Gray an email to explain that the investigation had ended, remind

him that failure to respond to an information notice was a criminal offence and point out that under PECR the onus was on H&L, as the sender of the messages, to prove that it had had valid consent. The email referred him to the introductory letter of 10 June 2020, which had outlined the enforcement powers available to the ICO, and explained that the ICO would now consider whether formal enforcement action was appropriate. The email gave him a further opportunity to provide any relevant evidence which he had, which he must do by 18 May 2021. No response was received.

58. H&L's registration with the ICO expired on 27 May 2021.
59. The ICO emailed [REDACTED] on 9 June 2021 asking him to confirm how many of the 584,632 SMS messages had been sent after 20 January 2020, when the first invoice had been issued to H&L, in order to ascertain how many of the SMS messages sent by Mr Gray had been sent on behalf of JG Consulting and how many had been sent on behalf of H&L. [REDACTED] informed the ICO on 16 June 2021 that 451,705 SMS messages had been sent by the subscriber Julius Grey after 20 January 2020, of which 378,538 had been delivered.
60. The Commissioner has made the above findings of fact on the balance of probabilities.
61. The Commissioner has considered whether those facts constitute a contravention of regulations 22 and 23 of PECR by H&L and, if so, whether the conditions of section 55A DPA are satisfied.

The contravention

62. The Commissioner finds that H&L contravened regulation 22 of PECR as follows. The Commissioner finds that H&L sent 451,705 SMS messages, of which 378,538 were delivered, which were unsolicited direct marketing message sent to subscribers who had not consented to receiving them, between 20 January 2020 and 27 July 2020. This resulted in 314 complaints from subscribers through the 7726 spam reporting service and eight complaints through the ICO's Online Reporting Tool. The Commissioner finds that H&L transmitted or instigated the transmission of those direct marketing messages contrary to regulation 22 of PECR.
63. H&L as the sender or instigator of the direct marketing, is required to ensure that it is acting in compliance with the requirements of regulation 22 of PECR and to ensure that valid consent to those messages had been acquired.
64. In this instance, H&L sought to profit from the Covid-19 pandemic, by sending messages to individuals offering them the opportunity to "Get Debt FREE during the Lockdown!". Message logs provided by [REDACTED] show that 92,702 of the messages sent by H&L between 18 May and 23 June 2020 included that wording. The messages misleadingly referred to a "government solution", "government help" or to the solution being "government backed", despite the fact that H&L was not authorised by the FCA to provide products or services in connection with debt.
65. The contravention continued despite the commencement of the ICO investigation into JG Consulting on 10 June 2020. H&L sent 14,329 SMS messages between 23 June and 27 July 2020.

66. Mr Gray failed to co-operate with the ICO investigation and failed to respond to either the information notice issued against JG Consulting, under which he traded as a sole trader, or the information notice issued against H&L, of which he was the sole director and company secretary.
67. The Commissioner considers that Mr Gray attempted to frustrate his investigation, by removing the website address from the wording of the SMS messages in the period 22-27 July 2020 and by changing H&L's registered address following receipt of the first information notice.
68. The Commissioner has noted that Mr Gray is part of an informal network of disqualified directors and liquidated companies, some of whom have been the subject of previous investigations by the ICO. The Commissioner infers that individual subscribers who responded positively to the SMS messages would have had their personal details sold or passed on to numerous third parties, resulting in further unsolicited marketing messages and possible financial loss.
69. H&L did not take the opportunity to put forward an explanation or evidence to the Commissioner on whether the consent of subscribers had been obtained and, if so, the nature and extent of the consent, or when or how it had been given.
70. The Commissioner's direct marketing guidance says "organisations need to be aware that indirect consent will not be enough for texts, emails or automated calls. This is because the rules on electronic marketing are stricter, to reflect the more intrusive nature of electronic messages."

71. However, it does go on to say that indirect consent may be valid, but only if it is clear and specific enough. If categories of organisations are referred to then those categories must be tightly defined and the organisation wanting to use the consent must clearly fall within the description. Consent is not likely to be valid where an individual is presented with a long, seemingly exhaustive list of categories of organisations.
72. For consent to be valid it is required to be "freely given", by which it follows that if consent to marketing is a condition of subscribing to a service, the organisation will have to demonstrate how the consent can be said to have been given freely.
73. Consent is also required to be "specific" as to the type of marketing communication to be received, and the organisation, or specific type of organisation, that will be sending it.
74. Consent will not be "informed" if individuals do not understand what they are consenting to. Organisations should therefore always ensure that the language used is clear, easy to understand, and not hidden away in a privacy policy or small print. Consent will not be valid if individuals are asked to agree to receive marketing from "similar organisations", "partners", "selected third parties" or other similar generic description.
75. The Commissioner is therefore satisfied from the evidence he has seen that H&L did not have the necessary valid consent for the 451,705 SMS direct marketing messages which it sent to subscribers between 20 January 2020 and 27 July 2020, of which 378,538 were delivered, which equates to an average of 63,089 a month or 14,019 a week.

76. Further, the Commissioner finds that H&L concealed its identity, in contravention of regulation 23 of PECR.
77. The Commissioner has gone on to consider whether the conditions under section 55A DPA are met.

Seriousness of the contravention

78. The Commissioner is satisfied that the contravention identified above was serious because of the high volume of messages over a sustained period of time. This is because between 20 January 2020 and 27 July 2020, a confirmed total of 451,705 direct marketing messages were sent by or sent at the instigation of H&L by SMS, of which 378,538 were delivered. These messages contained direct marketing material for which subscribers had not provided valid consent, either directly or indirectly. The SMS messages sent by H&L between 20 January 2020 and 27 July 2020 resulted in 314 complaints to the 7726 spam reporting service and eight complaints directly made to the ICO.
79. Although 73,167 SMS messages were not delivered to subscribers, their existence evidences an attempt by H&L to send even larger volumes of marketing messages to individuals without consent to do so, in addition to the 378,538 SMS messages which were delivered.
80. The Commissioner is therefore satisfied that condition (a) from section 55A(1) DPA is met.

Deliberate or negligent contraventions

81. The Commissioner has considered whether the contravention identified above was deliberate. In the Commissioner's view, this means that H&L's actions which constituted that contravention were deliberate actions (even if H&L did not actually intend thereby to contravene PECR).
82. The Commissioner considers that in this case H&L did deliberately contravene regulations 22 and 23 of PECR.
83. Mr Gray was the director of at least eleven companies between 2005 and 2020, so he should have been aware of the requirements of PECR. He was investigated by the ICO in 2019 in connection with his work for JG Consulting, so he was aware of the complaints received about JG Consulting's SMS marketing activities and the ICO's concerns about compliance with PECR.
84. Mr Gray failed to co-operate with the 2019 ICO investigation and instead set up a new company, H&L, with the apparent intention of concealing his activities from the regulator, the ICO. He omitted to mention his new company H&L in his correspondence with the ICO during July and August 2019, and registered H&L with the ICO only in May 2020 after the ICO had sent its initial investigation letter to [REDACTED], from which Mr Gray must inevitably have realised that the ICO was going to identify H&L as the sender of the SMS messages being investigated.
85. H&L sought to evade identification by falsely stating on their websites that outofdebtuk.co.uk and out-of-debts.co.uk were trading names of [REDACTED].

86. Mr Gray failed to provide any evidence of consent or any details of his relationships with the third parties who were mentioned during the ICO investigation.
87. For the above reasons, the Commissioner is satisfied that this breach was deliberate.
88. The Commissioner is therefore satisfied that condition (b) from section 55A (1) DPA is met.

The Commissioner's decision to issue a monetary penalty

89. The Commissioner has taken into account the following aggravating features of this case:
 - H&L concealed its identity, in contravention of regulation 23 of PECR.
 - The contravention was motivated by the potential of financial gain.
 - The ICO produces clear guidance via its website on the rules of direct marketing. In addition, the ICO operates a helpline, should organisations require further clarification in the event of any queries around their obligations under PECR.
 - The investigation established a history of several years of Mr Gray's involvement in a network of non-compliant organisations within the marketing sector.
 - The investigation found that H&L adapted its SMS message content and changed its email address in an apparent indication of poor regulatory compliance.
90. The Commissioner does not consider that there are any mitigating features of this case.

91. For the reasons explained above, the Commissioner is satisfied that the conditions from section 55A (1) DPA have been met in this case. He is also satisfied that the procedural rights under section 55B have been complied with.
92. The latter has included the issuing of a Notice of Intent, in which the Commissioner set out his preliminary thinking and invited H&L to make representations in respect of this matter. In accordance with the requirements of section 65 of the DPA, the Notice of Intent was served on the registered office of H&L. The Commissioner believes that H&L may no longer be operating from that address and that Mr Gray has failed to inform Companies House. Therefore, the Notice of Intent was subsequently also sent to the correspondence address for Mr Gray registered with Companies House and the email address used by Mr Gray in his communications with the ICO in the course of the investigation. Despite this, no representations were received from H&L in response to the Notice of Intent.
93. The Commissioner is accordingly entitled to issue a monetary penalty in this case.
94. The Commissioner has considered whether, in the circumstances, he should exercise his discretion so as to issue a monetary penalty.
95. The Commissioner has attempted to consider the likely impact of a monetary penalty on H&L. However, there is no publicly available financial information available about the company. H&L was invited to provide financial representations in response to the Notice of Intent but failed to do so. The Commissioner considers in the circumstances that a penalty remains the appropriate course of action.

96. The Commissioner's underlying objective in imposing a monetary penalty notice is to promote compliance with PECR. The sending of unsolicited direct marketing messages is a matter of significant public concern. A monetary penalty in this case should act as a general encouragement towards compliance with the law, or at least as a deterrent against non-compliance, on the part of all persons running businesses currently engaging in these practices. The issuing of a monetary penalty will reinforce the need for businesses to ensure that they are only messaging those who specifically consent to receive direct marketing.
97. For these reasons, the Commissioner has decided to issue a monetary penalty in this case.

The amount of the penalty

98. Taking into account all of the above, the Commissioner has decided that a penalty in the sum of **£80,000 (eighty thousand pounds)** is reasonable and proportionate given the particular facts of the case and the underlying objective in imposing the penalty.

Conclusion

99. The monetary penalty must be paid to the Commissioner's office by BACS transfer or cheque by **28 April 2022** at the latest. The monetary penalty is not kept by the Commissioner but will be paid into the Consolidated Fund which is the Government's general bank account at the Bank of England.
100. If the Commissioner receives full payment of the monetary penalty by **27 April 2022** the Commissioner will reduce the monetary

penalty by 20% to **£64000 (sixty four thousand pounds)**.

However, you should be aware that the early payment discount is not available if you decide to exercise your right of appeal.

101. There is a right of appeal to the First-tier Tribunal (Information Rights) against:

- (a) the imposition of the monetary penalty and/or;
- (b) the amount of the penalty specified in the monetary penalty notice.

102. Any notice of appeal should be received by the Tribunal within 28 days of the date of this monetary penalty notice.

103. Information about appeals is set out in Annex 1.

104. The Commissioner will not take action to enforce a monetary penalty unless:

- the period specified within the notice within which a monetary penalty must be paid has expired and all or any of the monetary penalty has not been paid;
- all relevant appeals against the monetary penalty notice and any variation of it have either been decided or withdrawn; and
- the period for appealing against the monetary penalty and any variation of it has expired.

105. In England, Wales and Northern Ireland, the monetary penalty is recoverable by Order of the County Court or the High Court. In

Scotland, the monetary penalty can be enforced in the same manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Dated the 29 March 2022

Andy Curry
Head of Investigations
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

ANNEX 1

SECTION 55 A-E OF THE DATA PROTECTION ACT 1998

RIGHTS OF APPEAL AGAINST DECISIONS OF THE COMMISSIONER

1. Section 55B(5) of the Data Protection Act 1998 gives any person upon whom a monetary penalty notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the 'Tribunal') against the notice.

2. If you decide to appeal and if the Tribunal considers:-

a) that the notice against which the appeal is brought is not in accordance with the law; or

b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.

3. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber
HM Courts & Tribunals Service
PO Box 9300
Leicester
LE1 8DJ

Telephone: 0203 936 8963
Email: grc@justice.gov.uk

- a) The notice of appeal should be sent so it is received by the Tribunal within 28 days of the date of the notice.
 - b) If your notice of appeal is late the Tribunal will not admit it unless the Tribunal has extended the time for complying with this rule.
4. The notice of appeal should state:-
- a) your name and address/name and address of your representative (if any);
 - b) an address where documents may be sent or delivered to you;
 - c) the name and address of the Information Commissioner;
 - d) details of the decision to which the proceedings relate;
 - e) the result that you are seeking;
 - f) the grounds on which you rely;
 - g) you must provide with the notice of appeal a copy of the monetary penalty notice or variation notice;
 - h) if you have exceeded the time limit mentioned above the notice of appeal must include a request for an extension

of time and the reason why the notice of appeal was not provided in time.

5. Before deciding whether or not to appeal you may wish to consult your solicitor or another adviser. At the hearing of an appeal a party may conduct his case himself or may be represented by any person whom he may appoint for that purpose.

6. The statutory provisions concerning appeals to the First-tier Tribunal (Information Rights) are contained in section 55B(5) of, and Schedule 6 to, the Data Protection Act 1998, and Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (Statutory Instrument 2009 No. 1976 (L.20)).